STATE OF MICHIGAN

COURT OF APPEALS

ROBERT VANHELLEMONT and MINDY VANHELLEMONT, Plaintiffs-Appellants, v ROBERT GLEASON, MEREDITH COLBURN, DONNA BARLOW, and SKBK SOTHEBY'S INTERNATIONAL REALTY, Defendants-Appellees.	UNPUBLISHED September 24, 2009 No. 286350 Oakland Circuit Court LC No. 2007-085475-CZ

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Plaintiffs appeal of right the circuit court's order granting summary disposition in favor of defendants. We affirm.

I

Plaintiffs desired to purchase a home in Birmingham, Michigan. Defendant Donna Barlow, a licensed real estate sales agent of defendant SKBK Sotheby's International Realty (SKBK), and an agent with whom plaintiffs had worked in the sale and purchase of other Birmingham properties, began assisting plaintiffs in their search, and eventually showed them a property owned by Kevin McManamon (hereafter the McManamon Property). Gleason and SKBK were the listing and selling brokers of the McManamon Property, and listed the property for sale on July 26, 2006. Defendant Meredith Colburn, also a licensed real estate sales agent of SKBK, was the listing agent of the McManamon Property.

After seeing the McManamon Property, the plaintiffs told Barlow they wished to make an offer to purchase the property. On August 13, 2006, Barlow prepared a purchase offer for the McManamon Property (on a document titled Purchase Agreement). Barlow and the plaintiffs signed the Purchase Agreement offer. Barlow also prepared a disclosure form required by MCL 339.2517(1) and MCL 339.2517(2). This document, titled "Disclosure Regarding Real Estate Agency Relationships," is a state-law mandated disclosure, from the licensee, i.e., the licensed real estate agent, to the potential home buyer or seller, describing the nature of the operative agency relationship(s) for the potential real estate transaction at issue.

Plaintiffs and Barlow signed the disclosure form on August 13, 2006, which identified Barlow as a "dual agent" with respect to the offer being submitted on the McManamon Property. The disclosure form stated that as a dual agent, Barlow would act as the agent of both plaintiffs and McManamon on the transaction, but would not owe plaintiffs or McManamon the full range of fiduciary duties normally owed by a buyer's agent or a seller's agent. MCL 339.2517(9)(f).[1] Plaintiffs also initialed a document generated by SKBK that gave an expanded explanation of what a dual agent could and could not do on behalf of the buyer and seller in a real estate transaction. After the plaintiffs' offer was submitted to McManamon, McManamon also initialed the SKBK "dual agency" document.

A series of counteroffers between McManamon and plaintiffs ensued, and a final agreement was reached on August 18, 2006. Barlow prepared a final Purchase Agreement document to reflect the negotiated terms to which the parties had agreed. The document reflected that plaintiffs agreed to purchase the McManamon Property for $2,182,500, and to deposit earnest money in the amount of $35,000. The parties also agreed to close on January 15, 2007, some five months after the agreement was reached. The agreement required the seller to order a commitment for title insurance within 14 days, and to furnish it to plaintiffs. In addition, in relevant part, paragraph 14.A. of the Purchase Agreement provided that if the buyer should default, such as by failing to close by January 15, 2007, "[s]eller may elect to enforce terms herein, declare sale void, retain deposit . . . and/or seek available equitable remedies." Paragraph 17 of the Purchase Agreement provided: "**DISCLAIMER OF BROKERS**: . . . Parties acknowledge that they are not relying on any representation or warranties that may have been made other than those in writing." The Purchase Agreement also provided: "**LEGAL COUNSEL RECOMMENDATION**: BROKER(S) RECOMMEND(S) THAT ALL PARTIES TO THIS AGREEMENT RETAIN AN ATTORNEY TO PROTECT THEIR INTERESTS."

Contemporaneous with the signing of the Purchase Agreement, on August 18, 2006, plaintiffs and McManamon also signed an option agreement that afforded plaintiffs with "an option to terminate the Purchase Agreement thirty (30) days prior to the Closing Date . . .." If plaintiffs exercised the option, a new Purchase Agreement with "like terms" to the prior agreement would become operable, at a purchase price of $1,682,500. In exchange, the terms of the option agreement required plaintiffs to make a deposit of $500,000 at the time they exercised the option. McManamon was permitted to retain the $500,000 deposit in the event plaintiffs did not close on the property.

The Purchase Agreement and the option agreement having been executed, on August 21, 2006, Colburn requested a title insurance commitment for the property. She received the commitment on August 24, 2006. Shortly thereafter, Colburn told Barlow that SKBK had

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[1] MCL 339.2517 was substantially modified by the Legislature, effective July 1, 2008. Because "[a]mendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent," *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001), we cite to the statutory section in effect at the time the dual agency agreement at issue was signed by the parties.

received the title commitment. However, Colburn did not physically give the title commitment paperwork to Barlow.

The option expired without being exercised by plaintiffs, and shortly thereafter, plaintiffs attempted to negotiate a land contract purchase of the property with McManamon. McManamon refused to renegotiate the terms of the Purchase Agreement. Plaintiffs then declared that McManamon had breached the terms of the Purchase Agreement and was in default, because he failed to provide them with the required title commitment within 14 days of the date of the Purchase Agreement, September 1, 2006. Plaintiffs further declared that because of this alleged breach by McManamon, they did not intend to close on the transaction on January 15, 2007. After receiving notice of plaintiffs' claim of default, McManamon provided a copy of the title commitment to plaintiffs on January 11, 2007. Plaintiffs still refused to close after receipt of the title commitment.

McManamon filed suit against the plaintiffs for breach of contract, and ultimately moved for summary disposition of the case. In support of his motion, McManamon in part relied upon affidavits signed by Barlow and Colburn. Barlow averred in her affidavit, dated March 19, 2007, that, as the plaintiffs' agent, she did not receive a title insurance commitment for the McManamon Property within 14 days of the signing of the Purchase Agreement. Colburn averred in her affidavits dated February 21, 2007 and April 5, 2007, that she received the title insurance commitment on or about August 24, 2006, and that within a few days thereafter, she had discussed with Barlow the fact that the title commitment had been received by SKBK. After briefing and oral argument, on October 3, 2007, the circuit court granted summary disposition in favor of McManamon as to liability only, concluding that while plaintiffs had breached the terms of the Purchase Agreement by failing to close, the question of whether the proper remedy for the breach should be specific performance or monetary damages was reserved for trial. Plaintiffs represent, and defendants agree, that prior to the remedy phase of the trial, in settlement of the case against them, plaintiffs granted McManamon specific performance and closed on the McManamon property under the terms of the Purchase Agreement.[2]

While McManamon's breach of contract action against the plaintiffs was still pending, on August 30, 2007, plaintiffs commenced this action against defendants, alleging claims of professional malpractice, breach of fiduciary duty, and fraud. Plaintiffs asserted in their complaint that (1) notwithstanding the dual agency agreement, defendants' failure to ensure that they represented plaintiffs' interests by drafting a buyer-oriented purchase agreement that provided the seller's sole remedy for the plaintiffs' failure to close on the purchase would be loss of the $35,000 earnest money deposit, rather than a seller-oriented purchase agreement, and defendants' further failure to ensure that the sale of plaintiffs' then current home was a condition precedent to closing on the purchase of the McManamon Property, constituted professional malpractice; (2) alternately, defendants' engagement in a dual agency relationship with respect to

[2] While we accept this assertion as a true, nevertheless, we note that there is no documentary or affidavit evidence in the record in support of, or contrary to, the parties' representation that specific performance of the Purchase Agreement occurred.

the purchase of the McManamon Property constituted a breach of defendant's fiduciary duties to plaintiffs; (3) in order to induce plaintiffs to sign the Purchase Agreement, defendants made fraudulent representations that the Purchase Agreement as drafted was buyer-oriented and not seller-oriented, that the seller's sole remedy under the agreement as drafted for plaintiffs' failure to close on the transaction would be the loss of the $35,000 earnest money deposit, and that the sale of plaintiffs' home was a condition precedent to closing on the transaction; (4) that defendants' representation of plaintiffs with respect to the drafting of the Purchase Agreement, and defendants' execution of affidavits filed in support of McManamon's motion for summary disposition, were violations of the standard of care applicable to real estate agents and brokers, as well as negligent breaches of defendants' duties to plaintiffs; and (5) that as a result of defendants' wrongful actions and omissions, defendants should be found jointly and severally liable to plaintiffs, in contribution, for any amounts plaintiffs were found to be liable to McManamon.

Following discovery, defendants filed a motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim on which relief can be granted) and (C)(10) (no genuine issue of material fact). Defendants argued, in relevant parts, (1) that plaintiffs' negligence and professional malpractice claims must fail because defendants' sole duties to plaintiffs were contractual, and that plaintiffs could therefore not assert claims in tort against the defendants; (2) that defendants did not breach any alleged fiduciary duties to the plaintiffs, and that in any event, the terms of the dual agency agreement and the purchase agreement precluded liability; and (3) that plaintiffs could not point to evidence in the record sufficient to satisfy the elements of a claim of fraud.

Plaintiffs challenged defendants' motion for summary disposition, arguing in response that the evidence supported their assertions that defendants committed professional malpractice and negligence by failing to ensure, consistent with their alleged representations, that the only penalty to be stated in the Purchase Agreement for the McManamon Property, for plaintiffs' failing to close on the agreement, was the forfeiture of the $35,000 earnest money deposit. Plaintiffs further argued that defendants' alleged representations imposed duties in tort that were consistent with and complimentary to defendants' duties under the dual agency agreement, and that neither the language of the Purchase Agreement nor the dual agency agreement precluded liability for breach of fiduciary duty. Plaintiffs also contended that defendants had failed to proffer any evidence to refute plaintiffs' claims of fraud by defendants. Robert VanHellemont's affidavit, filed in support of plaintiffs' response to the motion, identified the various representations plaintiffs alleged were breached by defendants, including that defendants promised to represent plaintiffs' best interests notwithstanding the dual agency agreement, promised to prepare a buyer-oriented agreement, agreed to ensure that the sole remedy for the plaintiffs' default on the Purchase Agreement would be the loss of the earnest money deposit, and agreed that the sale of plaintiffs' then current home would be a condition precedent to closing on the purchase of the McManamon Property.

Following oral argument, the circuit court granted summary disposition in favor of defendants.

II

Plaintiffs first argue on appeal that the circuit court erred in dismissing their malpractice claim, because there was a genuine issue of a material fact as to whether defendants breached duties owed to plaintiffs under the dual agency agreement. We disagree.

We review summary disposition rulings de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Whether one party owes a duty to another is a question of law, reviewed de novo. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313, 316 (2007).

A prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Id*. (internal quotation marks and citation omitted).

Duty has been defined as "an obligation that the defendant has to the plaintiff to avoid negligent conduct." *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997). Whether a duty exists is a question of law. *Meek v Dep't of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000). If a court determines as a matter of law that a defendant owed no duty, summary disposition is appropriate. *Terry, supra* at 424.

The question of duty turns on the relationship between the actor and the injured person. *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 668; 593 NW2d 578 (1999). Here, because defendants' relationship to plaintiffs was that of a dual agent, defendants' duty to plaintiffs is defined by the dual agency agreement signed by plaintiffs and Barlow. In signing this agreement, defendants complied with MCL 339.2517(1) to advise plaintiffs, and plaintiffs acknowledged, that defendants would not be able to provide the full range of fiduciary duties typically owed to buyers by a buyers' agent, such as the obligation to promote the best interests of the buyer or to fully disclose to the buyer all facts that might affect or influence the buyer's decision to tender an offer to purchase. Thus, we reject plaintiffs' contention that defendants violated their duties as dual agents because the Purchase Agreement did not make the sale of plaintiffs' home a condition precedent to closing the transaction, or because the Purchase Agreement did not provide that the sole remedy for failure to close was forfeiture of the earnest money deposit. In fact defendants' would have violated their duties as dual agents had they drafted either a buyers-oriented *or* sellers-oriented agreement. In short, by signing the dual agency agreement, plaintiffs acknowledged that defendants' duty was simply to "provide services to complete a real estate transaction." MCL 339.2517(f).

Since defendants' duty as a dual agent was simply to provide services to complete the transaction, plaintiffs were solely responsible for having understood the implications of the Purchase Agreement they freely signed. *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 218-219; 702 NW2d 106 (2005)("[t]he law presumes that the contracting parties' intent is embodied in the actual words used in the contract itself."). That the Purchase Agreement is unambiguous and contained no conditions precedent requiring the sale of plaintiffs' home before closing on the transaction, and no statement that the sole remedy for

plaintiffs' failure to close the agreement would be forfeiture of the earnest money deposit, is therefore conclusive evidence of plaintiffs' and McManamon's intent, when they signed the Purchase Agreement, that such terms were not part of the agreement.

In addition, the fact that plaintiffs signed an option agreement prepared by Barlow that would have given plaintiffs the opportunity to avoid the imposition of the remedy of specific performance, by exercising the option and, in the event plaintiffs failed to close, forfeiting the $500,000 deposit, is strong evidence that plaintiffs understood that the Purchase Agreement did *not* limit McManamon's remedies if plaintiffs failed to close on the transaction. Plaintiffs offer no logical explanation, and we can conceive of none, why they negotiated and signed an option agreement under which, should they have exercised the option and failed to close on the transaction, they would have forfeited $500,000, if the Purchase Agreement itself permitted the plaintiffs to refuse to close on the transaction at the much smaller penalty of $35,000.

We also reject plaintiffs' claim that defendants committed professional malpractice, negligence or a breach of any duty because the title commitment was not delivered to plaintiffs on September 1, 2006, but instead was delivered on January 11, 2007. First, this claim was not pleaded in the complaint or decided by the trial court, and therefore, is not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Second, even if we were to review this claim,[3] plaintiffs' claim that the title commitment was delivered to them well beyond the point in time when plaintiffs could exercise a right of rescission because of defects in the title, misconstrues the language of the Purchase Agreement. Paragraph 10 of the Purchase Agreement provides that seller will *order* the title insurance within 14 days of the agreement. We find no language in the agreement requiring defendants to *deliver* the title commitment to plaintiffs within 14 days, and plaintiffs fail to identify any such language. As such, by ordering the title commitment on August 21, 2006, defendants complied with the terms of the Purchase Agreement. Third, plaintiffs have not identified or asserted in this action any defects in the marketability of the title precluding closure of the transaction, or any defects they were required to accept when they actually closed on the transaction.

Given the evidence presented to the trial court, for all of the above reasons we conclude that the trial court did not err by finding that plaintiffs failed to show the existence of a genuine issue of material fact as to whether defendants were professionally negligent. Summary disposition on this claim in defendants' favor was properly granted.

III

Plaintiffs next argue that the circuit court erred in granting summary disposition of their breach of fiduciary duties claim, contending that there were genuine issues of material fact as to whether such duties were breached. We disagree.

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[3] We decline to do so because there is no showing that a manifest injustice would occur, or that deciding this issue is necessary to a proper resolution of the case. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

As we noted above, the dual agency agreement signed by plaintiffs and defendants constituted the entirety of the agency relationship between the parties. As dual agents, defendants were unable to provide the full range of fiduciary duties typically owed to buyers by a buyers' agent, and had only the duty to "provide services to complete a real estate transaction." MCL 339.2517(f).[4] Plaintiffs attempt to avoid the impact of this limited duty by claiming that, despite the dual agency agreement, they were led to believe that defendants were negotiating a buyers-oriented agreement on plaintiffs' behalf, and that when they signed the Purchase Agreement, they believed the Purchase Agreement contained the buyers-oriented provisions they had allegedly discussed with defendants.

However, as a general rule, "one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms." *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 29; 761 NW2d 151 (2008), quoting *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999) (Citation omitted.). The plain language of the Purchase Agreement contains no condition precedent of the sale of plaintiffs' then current home, and no limitation of McManamon's remedies for plaintiffs' failure to close the transaction. Plaintiffs cannot now argue that they supposed these terms were contained in the agreement when they signed it. *Zaremba*, *supra*.

Moreover, plaintiffs affirmed in paragraph 17 of the Purchase Agreement that they relied on no representations or warranties that were not in writing. Thus, having agreed to the dual agency arrangement in order to facilitate the submission of an offer on the McManamon Property, and there being no requirement stated in the dual agency agreement that defendants should ensure the inclusion of certain specified provisions in the Purchase Agreement, plaintiffs cannot now argue that defendants had duties to plaintiffs beyond those set forth in the dual agency agreement.

For the foregoing reasons, we conclude that the trial court properly granted summary disposition in favor of defendants on plaintiffs' breach of fiduciary duties claim.

IV

Plaintiffs last contend on appeal that the circuit court erred in granting summary disposition of their fraud claim. Again, we disagree.

Fraud has six elements: (1) a material misrepresentation; (2) that was false; (3) that when the defendant made the representation, defendant knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that the defendant made the representation with the intention that it should be acted upon by the plaintiff; (5) that the plaintiff acted in reliance upon the representation; and (6) that the plaintiff thereby suffered injury.

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[4] Indeed, since SKBK was the listing broker, and Colburn, an SKBK agent, was the listing agent, we see no way that Barlow could have ethically worked with plaintiffs to submit an offer on the McManamon Property *unless* plaintiffs agreed that defendants would act as dual agents on the transaction.

Cooper v Auto Club Ins Ass'n, 481 Mich 399, 408; 751 NW2d 443, 448 (2008). "Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." *Id*. "Further, an action for fraud must be predicated upon a false statement relating to a past or existing fact; promises regarding the future are contractual and will not support a claim of fraud." *Cummins v Robinson Twp*, 283 Mich App 677, 696; ___ NW2d ___ (2009) (citation omitted). "Further, to establish a claim of fraudulent misrepresentation, the plaintiff must have reasonably relied on the false representation." *Id*. Finally, there can be no fraud where a person has the means to determine that a representation is not true. *Id*.

Plaintiffs are unable to show the existence of a genuine issue of material fact on their fraud claim. Paragraph 37 of the Purchase Agreement urged the parties to retain legal counsel to protect their interests. In addition, plaintiffs acknowledged when they signed the Purchase Agreement that they relied on no unwritten representations in signing the agreement, and they have not shown any written representations made by defendants that defendants assumed any duties beyond those established in the dual agency agreement. Given the plain language of both the Purchase Agreement and the dual agency agreement, plaintiffs cannot establish either that they relied upon any unwritten representations made by defendants, or that they reasonably relied on any such representations.

For the above-stated reasons, we conclude that the trial court properly granted summary disposition in favor of defendants on plaintiffs' fraud claim.

V

On the record before us, we conclude that the trial court properly granted summary disposition in favor of defendants. Therefore, we affirm. Defendants, being the prevailing parties, may tax costs pursuant to MCL 7.219.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens